UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

KHRG EMPLOYER, LLC D/B/A HOTEL BURNHAM & ATWOOD CAFÉ

and **Case 13-CA-162485**

UNITE HERE LOCAL 1, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

Respondent's arguments against the General Counsel's exceptions are unconvincing for two primary reasons. First, Respondent, like the ALJ[1], dodges the main argument offered by the General Counsel in this case, namely, that Demma's use of the security code cannot be severed from his undisputedly protected activity of delivering the petition to management. Because of this inseparability, the correct analysis is the well-established two-part test that simply asks, was the person engaged in protected concerted activity, and if so, did they somehow *lose* the protection of the Act. The fact that Respondent offers no legal support for the proposition that conduct that is part of the *res gestae* of undisputedly otherwise protected concerted activity can be considered completely separately from the protected activity powerfully supports the General Counsel's case. Second, Respondent's *Wright Line* argument mirrors that of the ALJ's in her decision which the General Counsel explained was simply in error in its Brief in Support of Exceptions. Respondent failed to make new arguments and instead merely mischaracterized several facts in this case. Respondent's positions are unconvincing and will be addressed in turn below.

[1] In this Reply Brief, the Administrative Law Judge will be referred to as the "ALJ," the National Labor Relations Board will be referred to as the "Board," KHRG Employer, LLC will be referred to as "Respondent," Unite Here, Local 1 will be referred to as the "Union." Citations to the ALJ's decision will be referred to as the "ALJD" followed by the page and line number specifically referenced, citations to the General Counsel's Exceptions will be referred to as "GC's Exceptions p. #," citations to General Counsel's Brief in Support of Exceptions will be referred to as "GC's Brief in Support of Exceptions p. #," and Respondent's Answering Brief will be referred to as "Respondent's Ans. Brief p. #."

I. Respondent, like the ALJ, failed to offer any legal support for separating alleged misconduct from protected concerted activity when they occur together

Respondent, like the ALJ, mistakenly separates Demma's conduct of entering the code into a secured door from the delivery of the petition and goes on to apply *Wright Line* as a result of this mistake. (Respondent's Ans. Brief p. 11). The ALJ did not address this argument, and Respondent fails to do so as well.

Respondent claims that "the ALJ considered and convincingly rejected all the General Counsel's arguments" (Respondent's Ans. Brief p. 11). However, the General Counsel's Brief in Support specifically addresses the ALJ's complete failure to analyze the argument that entering the security code was inextricably linked to Demma's protected conduct and thus a test other than *Wright Line* should apply. (GC's Exceptions 1 & 2). Therefore, the assertion that the ALJ considered and rejected all of the General Counsel's arguments is simply incorrect. Rather, the General Counsel cited several cases to support this contention, none of which are even mentioned by the ALJ in her decision. (GC's Brief in Support of Exceptions p. 6; 9).

In its Exceptions the General Counsel established that the proper test involves two questions: 1) whether the activity in question was protected concerted activity, and if so, 2) whether the conduct that occurred during the course of the protected activity lost the protection of the Act. (GC's Exceptions at p. 9). The General Counsel goes on to cite numerous cases that apply this two part test. See *White Oak Manor*, 353 NLRB 795, 795 (2009); *Consumers Power*, 282 NLRB 130 (1985); *US Postal Service*, 250 NLRB 4 (1980); *Firch Baking Co.*, 232 NLRB 772 (1977). Yet in response, Respondent offers no legal support for its claim that this well-established test is inappropriate here, or, more importantly, that separating the allegedly unprotected conduct from conduct that occurs in the course of what is specifically held to be protected activity is permissible under Board law. Instead, Respondent assumes, without legal

support, that separating Demma's use of the code from the delivery of the petition is appropriate. For the reasons explained in the Exceptions and Brief in Support, this is simply in error.

A. Respondent's assertion that the cases cited by the General Counsel are not applicable to support the General Counsel's primary argument is completely unfounded.

Next, Respondent argues that the cases cited by the General Counsel are not applicable because "those cases involve employees using "bad words" (or, on occasion, committing actual violence) while presenting a grievance or otherwise engaging in otherwise protected activity." (Respondent's Ans. Brief p. 18). Respondent attempts to distinguish the various cases cited by the General Counsel from the instant case by pointing to specific facts in the cited cases that do not match the facts here. However, as established in the General Counsel's Exceptions, cases like *Consumers Power,* 282 NLRB 130 (1986); *US Postal Service,* 250 NLRB 4 (1980); and *Roemer Industries, Inc.*, 362 NLRB No. 96 (2015) were not cited to establish a direct comparison of the facts, but instead to establish that the Board conducts the two-part test in question when two actions are inextricably linked. (GC's Exceptions p 3; 9).

For example, three of the cases Respondent cites in an effort to distinguish those cases from the facts here are *Roemer Industries, Inc*., 362 NLRB No. 96 (2015), *Crowne Plaza LaGuardia*, 357 NLRB 1097 (2011) and *White Oak Manor*, 353 NLRB 795 (2009). (Respondent's Ans. Brief pgs. 18-19). *Roemer Industries, Inc.* involved statements made during an investigative meeting. 362 NLRB at *1; *Crowne Plaza LaGuardia* involved physical force used during the delivery of a petition. 357 NLRB at 1097; and *White Oak Manor* involved taking pictures of co-workers without authorization to show a disparity in the dress code. 353 NLRB at 795. Each of those cases analyzed whether the activity in question was protected concerted activity and whether the conduct that occurred during the course of the protected activity (i.e.

statements, physical force, taking pictures) lost the protection of the Act. This is precisely what the General Counsel requests the Board do here, apply this well-established test to the facts of this case as the Board has routinely done in the past.

Respondent tries to further argue that another case relied on by the General Counsel in its Exceptions is inapplicable because it predates *Atlantic Steel*. Specifically, Respondent argues that because *Firch Baking Co,* 232 NLRB 772 (1977) was decided prior to *Atlantic Steel,* the two-part test was applied only because *Atlantic Steel* did not exist. (Respondent's Ans. Brief p. 20) However, as is evident from the General Counsel's Exceptions, and pursuant to cases later cited in Respondent's Answering Brief, the Board, time and time again, still applies this two-part test well after *Atlantic Steel*. See, e.g., *White Oak Manor,* 353 NLRB 795, 795 (2009); *Consumer Power,* 282 NLRB 130 (1986); *US Postal Service,* 250 NLRB 4 (1980).

Next, somewhat surprisingly, Respondent argues that unlike the facts here, in *Firch Baking Co.,* the Board could not separate the bad act and the protected act in time or space. (Respondent's Ans. Brief p. 20). However, that is exactly the same predicament here—an inability to separate the two acts. In *Firch Baking Co,* during a disciplinary meeting the discriminatee used inappropriate language when addressing his supervisor, which the Board found did not warrant depriving him of the Act's protections. 232 NLRB at 772. Similarly, here Demma's conduct was inextricably linked with his protected activity, meaning it cannot be separated in time or space. (GC's Brief in Support of Exceptions p. 6-8). Just as in *Firch Baking Co.* where the bad act occurred during the course of the protected conduct, the same was the case here and there is simply no way to parse the two actions. In fact, in an effort to distinguish the two cases Respondent only offers an unhelpful hypothetical to suggest that the Board here would be beyond its decision making authority to employ a test other than *Wright Line*. (Respondent's

Ans. Brief p. 20) Respondent proffers that the Board would not engage in a balancing test if an employee stole equipment from the Employer and then used it in the course of otherwise protected activity because it "would stretch the Board beyond its proper authority (assessing the wisdom of employer disciplinary decisions), and nothing in the Board's prior case law suggests as much." (Respondent's Ans. Brief p 20) This is yet another example of Respondent's attempt to skirt around addressing the General Counsel's primary argument.

B. There is a clear misperception by Respondent when Respondent compares Atlantic Steel to the two-part test asserted by the General Counsel

Respondent is incorrect in assessing the General Counsel's application of the two-part test in comparison to *Atlantic Steel*. In a footnote, Respondent mistakenly asserts that "*Atlantic Steel* and its progeny have refined the relevant question into a four-part balancing test." (Respondent's Ans. Brief p 22, fn. 1) In other words, Respondent suggests that the second question of the two-part test—whether the conduct that occurred during the course of the protected activity lost the protection of the act—has been refined or replaced by the analysis in *Atlantic Steel*. However, this misstates the applicable legal authority. *Atlantic Steel* is not a "four-part balancing test" at all; it is the four factors that the Board uses, in some contexts, to determine whether an employee has lost the protection of the Act. That is, the four factors in *Atlantic Steel* are the questions the Board asks to decide whether an employee engaged in protected concerted activity can, by certain conduct, lose the protection of the Act.

II. Applying *Wright Line* or *Atlantic Steel* would still support a finding that Respondent violated Section 8(a)(1) of the Act.

In its Brief in Support of Exceptions to the ALJ's Decision, the General Counsel established that even if the tests in *Wright Line* or *Atlantic Steel* were applied to the facts of this case a violation of 8(a)(1) should still be found. (GC's Brief in Support of Exceptions pgs. 15-

27) In response to the these arguments, Respondent: 1) fails to address the General Counsel's exceptions other than to reiterate the ALJ's arguments and 2) misstates critical facts which lead to faulty conclusions. Each of these issues will be addressed below.

First, Respondent reiterates the ALJ's argument in regards to the sham investigation into Demma's conduct. Respondent stated that "[t]o begin with, it is difficult to characterize the investigation as a 'sham' when the General Counsel, the Union and Respondent all agree that Demma is the one who allowed the breach of security." While it is true the video shows Demma using the code to enter the area where he could deliver the petition that does not mean the investigation was any less a sham. What makes it a sham is explained in the GC's Brief at 20-22, which describes how Palladino only questioned anti-union employees about the day's events *after* watching the surveillance video showing that Demma used the code. Demma was allegedly terminated for using his security code, thus viewing the surveillance video should have been sufficient. However, the true purpose of the investigation was to offer support for terminating open union supporter Demma, not conduct a full and fair investigation. (GC's Brief in Support of Exceptions p. 25) In other words, the "result" of the investigation was a foregone conclusion—Demma was going to be fired—and the manner and timing of the "investigation" reveal that was nothing more than an attempt to legitimize his firing.

Respondent also reasserts the ALJ's argument that the reason Paladino investigated the anti-union restaurant employees after watching the surveillance video was because investigation of the restaurant employees may have uncovered other misconduct. (Respondent's Ans. Brief p 14) However, this is precisely why housekeepers should have been interviewed in addition to the other employees, so a *fair* uncovering of the facts could occur. Respondent offered no new arguments to support the sham investigation conducted by Palladino and instead relied on the

arguments from the ALJ's decision that the General Counsel already addressed in its Exceptions. (GC's Brief in Support of Exceptions pgs. 20-22).

Next, Respondent points out that the ALJ rejected the General Counsel's argument that the timing of Demma's termination and the fact that no other employee was disciplined for the delegation is evidence of discriminatory animus. (Respondent's Ans. Brief p. 12) However, the General Counsel, in its Brief in Support, describes in detail why the ALJ was wrong on both of these points. (GC's Brief in Support Exceptions pgs. 23-26). First, the General Counsel identifies the flawed reasoning behind the ALJ's argument that timing does not support discriminatory animus. (GC's Exceptions. p 23) However, Respondent failed to address the flaw in the ALJ's reasoning argued by the General Counsel and failed to offer a way to reconcile it. Second, Respondent mistakenly believes that the absence of discipline against other employees involved in the delegation weighs against a finding of discrimination and that "this conclusion is not debatable." (Respondent's Ans. Brief p. 13) It is very debatable, as explained in GC's Brief in Support. (GC's Brief in Support of Exceptions, p 25-26) As noted above, the other employees involved in the delegation stood by and allowed Demma to use his code and received no discipline. Certainly, their actions appear to be as much of a "breach" as Demma's. However, Respondent's failure to discipline these employees does not negate the discriminatory animus. See, e.g. *Nat'l Steel & Shipbuilding Co.*, 324 NLRB 1114, 1122 fn. 8 (1997) (judge noting that it "is well settled an employer's failure to discipline other union activists, or its favorable treatment of some union supporters, does not undermine the conclusion of unlawful motivation as to a particular employee.")

In regards to *Atlantic Steel*, both the ALJ and Respondent argue that it is not the proper test but neither analyzes the facts of this case applying the *Atlantic Steel* factors. However, the

General Counsel's Exceptions clearly establish how, if the *Atlantic Steel* factors are used to analyze Demma's conduct, a violation should still be found. (GC's Brief in Support of Exceptions pgs. 15-18)

III. Conclusion

Based upon the foregoing, Counsel for the General Counsel respectfully request that the Board find merit to the General Counsel's Exceptions to the Decision of the Administrative Law Judge.

Dated at Chicago, Illinois, this 12th day of May 2017.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Reply Brief to Respondent's Answering Brief** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on May 12, 2017 and that true and correct copies of the document were served on the parties in the manner indicated below:

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